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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., *etc., et al.*,
Petitioners,
v.
JOSEPH V. MANNING, *etc., et al.*,
Respondents.

No. 455

AMERICAN AIRLINES, INC.,
Petitioner,
v.
JOSEPH V. MANNING, *etc., et al.*,
Respondents.

MEMORANDUM AND APPENDIX IN OPPOSITION TO MOTIONS BASED UPON MOOTNESS

ASHER W. SCHWARTZ,
501 Fifth Avenue,
New York, New York 10017,
Attorney for Respondents,
212 MU 2-1261.

WALTER N. KAUFMAN,
Of Counsel.

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MEMORANDUM IN OPPOSITION TO MOTIONS BASED UPON MOOTNESS

This memorandum "in opposition" is not intended to oppose the dismissal of these proceedings for mootness, but only to oppose dismissal in the manner requested by petitioners.

The suggested mootness has not come about through an extraneous event or the unilateral action of any of the parties, but solely by reason of a settlement entered into by all of the parties.* In moving to dismiss, petitioners rely upon that settlement, but have not fairly apprised the Court of the settlement provisions directly affecting the dismissal of pending litigation. In this memorandum, respondents would adequately acquaint the Court with those provisions and respectfully request the Court to dismiss these proceedings for mootness in the light of that settlement.

On October 17, 1964, petitioner American ("Company") and respondents ("Engineers") reached and initialed a "tentative agreement" resolving their long-standing labor dispute (App. 1a**). That agreement incorporated a "tripartite agreement," which petitioners cite in support of the suggestion of mootness (Supp. Jt. App. 2, *ff.*). On October 17th the "tripartite agreement" had yet to be signed by the third party, petitioners O'Connell *et al.* ("Pilots"); hence, the "tentative" over-all agreement between the Company and the Engineers.

Nonetheless, the Company announced to the public on October 18th that it had settled with the Engineers; and the letter signed on March 8, and 10, 1965, by the Secretary

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* In the District Court, petitioners unsuccessfully suggested mootness based upon their unilateral "declarations" and "assurances" to respondents. The District Court rejected the suggestion, largely on the authority of *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953). (227 F. Supp. 697-698)

** "App." references are to the Appendix annexed hereto. "Supp. Jt. App." references are to the Supplemental Joint Appendix submitted in support of petitioners' motions.

of Labor and the Chairman of the National Mediation Board, cited to the Court by petitioners, refers to the "terms and provisions of the Tripartite Agreement dated October 17, 1964" (Supp. Jt. App. 1-2).

Part and parcel of the October 17th agreement was the further provision: "All pending court proceedings between the parties to be discontinued without costs." The "pending court proceedings" are (1) the proceedings in this Court to review affirmance of the District Court's issuance of a preliminary injunction against the Company and Pilots in the "bargaining case," (2) the Engineers' petition in the District Court for a permanent injunction in this "bargaining case," and (3) the Engineers' petition in the District Court for a permanent injunction in a companion case, the "dues check-off case."*

In the Pilots' motion, the provision of the October 17th agreement for discontinuance of pending court proceedings is characterized as merely "preliminary" (p. 4), but on October 17th that aspect of the settlement was no more preliminary or tentative than the "tripartite agreement."

On December 11, 1964, the Company, the Engineers *and* the Pilots reached agreement, expressly affirming certain prior agreements, including the "Memorandum of Tentative Agreement between American and the FEIA as initialed by Asher W. Schwartz and A. DiPasquale on October

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* Earlier this term, this Court denied review of the affirmance of the District Court's issuance of a preliminary injunction against the Company in the "dues check-off case." *Manning* v. *American Airlines, Inc.*, 221 F. Supp. 301 (S. D. N. Y. 1963), *aff'd*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U. S. 817 (1964). In the "dues check-off case," a temporary restraining order against the Engineers, extended by stipulation, is also outstanding.

17, 1964, which memorandum includes as its Exhibit B a Tripartite Agreement" (App. 2a).

The December 11th agreement, by its terms, became "effective immediately," subject to termination if it failed of ratification by the Pilot and Engineer groups. On December 15th, the Pilots' counsel requested of the Chief Deputy Clerk of this Court that further action in printing the record be deferred pending probable ratification of the agreement, since "one of the provisions of this agreement requires the termination of all litigation among the parties" (App. 4a). The agreement was ratified in due course, and counsel for the Company so notified the Chief Deputy Clerk, stating that "subject to completion of some necessary paper work, it is anticipated that a stipulation for dismissal pursuant to Rule 60 will be submitted in about six weeks" (App. 5a). The paper work was completed March 12, 1965.

Counsel for the parties, however, have been unable to agree on the terms of a stipulation for dismissal, to be filed in each of the pending cases. Counsel for the Company has insisted upon a speaking stipulation (App. 6a-7a), which was acceptable to counsel for the Pilots. Although the Engineers' counsel had assumed that a stipulation in the customary form would be filed (App. 9a), he was willing to sign Company counsel's stipulation except for paragraph 2, which provides in part that "no aspect" of any of the pending cases, "or any determinations therein, shall be regarded as evidence that the parties, or any of them, have violated any requirements of law." Suggested revisions of paragraph 2 by counsel for the Engineers and for the Pilots have not proved mutually acceptable (App. 8a).

Both the Company's and Pilots'. counsel have refused to sign the alternative stipulation, in the customary form, submitted by the Engineers' counsel (App. 9a).

It is altogether apparent that the stipulations proposed by the Company's and Pilots' counsel, especially paragraph 2 thereof, go beyond the agreement of the parties to "discontinue" court proceedings. However, all counsel agree that in the "bargaining case"—the only case before this Court—"all outstanding orders . . . be vacated and all appeals and pending requests for relief . . . be dismissed, with prejudice and without costs to any party," as stated in paragraph 1 (a) of Company counsel's proposed stipulation (App. 6a). This Court will effectuate that agreement, as well as the settlement agreement, if it dismisses these proceedings and remits the case to the District Court with instructions to dismiss on the ground of mootness.

No litigation is pending in the Court of Appeals to be "discontinued"; and there is no "outstanding order" of the Court of Appeals to be "vacated." There is only a judgment affirming the District Court, without any directions whatever. That judgment has not become unreviewable by this Court through "happenstance," as had occurred in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950), relied upon by petitioners. There, while an appeal was pending, the price regulation allegedly violated was rendered inapplicable by administrative action.

In any event, there is no occasion for this Court to *reverse* the judgment of the Court of Appeals, as the Pilots request, but not the Company. There is an obvious likelihood that such reversal would be taken as a vindication of

petitioners on the merits. Petitioners should not be permitted to accomplish by motion what their counsel were unable to accomplish by stipulation.

Apparently this Court has reversed in moot case where the judgment of the Court of Appeals was coupled with directions to the District Court, on the theory, expressed in *Brownlow* v. *Schwartz*, 261 U. S. 216, 218 (1923), that but for such reversal, such orders would be left "in force, —at least apparently so." However, does not vacating the judgment serve the same purpose? Furthermore, it would seem as inappropriate to reverse as it would to affirm, as this Court also observed in *Brownlow* v. *Schwartz*, *supra* at 217: "One would be as vain as the other."

In a case decided not long after *Brownlow* v. *Schwartz*, the judgment of the Court of Appeals was vacated, not reversed, on the ground of mootness, even though this Court there held, citing *Brownlow* v. *Schwartz*, that the Court of Appeals had *erred*—that the *Court of Appeals* "should have remanded the cause with directions to dismiss the petition as moot." *United States* ex rel. *Norwegian Nitrogen Products Co.* v. *United States Tariff Comm'n*, 274 U. S. 106, 112 (1927). As the citations concluding the Company's memorandum reflect (p. 3), the current practice of this Court in moot cases is to vacate rather than reverse judgments of the Courts of Appeals.

However, this Court has also dismissed moot cases without disposing of any of the proceedings below, as in *Schenley Distilling Corp.* v. *Anderson*, 333 U. S. 878 (1948) (mem.): "The parties being in agreement that the cause is moot, the motion to dismiss is granted and the appeal is

dismissed." See also *Pan American Airways Corp.* v. *W. R. Grace & Co.*, 332 U. S. 827 (1947) (mem.). Dismissal in that form would carry out the settlement of the parties in this case—to "discontinue" these proceedings. The agreement among the parties must surely outweigh the disagreement among their counsel.

Moreover, had counsel filed a stipulation for dismissal pursuant to Rule 60 of the Rules of this Court, as they contemplated (App. 5a), the judgment of the Court of Appeals would not have been vacated, let alone reversed. The concern expressed in the Pilots' motion lest the preliminary injunction of the District Court be "left standing to plague the future relations of the parties" (p. 6) is wholly unwarranted, for, as already noted, the parties are agreed that all outstanding orders are to be vacated.

This Court's "supervisory power over the judgments of the lower federal courts is a broad one." *United States* v. *Munsingwear, Inc., supra* at 340 U. S. 40. "If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677 (1944). In framing its orders in moot cases, this Court may consider "the nature and character of the conditions which have caused the case to become moot." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 478 (1916); *Heitmuller* v. *Stokes*, 256 U. S. 359, 362 (1921).

For the foregoing reasons, respondents respectfully request that the Court, in dismissing these proceedings on the ground of mootness, do so consistently with the parties' settlement which has caused the mootness.

CONCLUSION

These proceedings should be dismissed without costs to any of the parties, and the case remanded to the United States District Court for the Southern District of New York for dismissal because of mootness.

Dated: New York, New York,
April 21, 1965.

Respectfully submitted,

ASHER W. SCHWARTZ,
Attorney for Respondents.

WALTER N. KAUFMAN,
Of Counsel.

APPENDIX

Memorandum of Tentative Agreement

/s/ AWS*
/s/ ADP**

October 17, 1964 New York, New York

MEMORANDUM OF TENTATIVE AGREEMENT

1. . . .

2. Tripartite Agreement as annexed (Ex. B) with following modifications:

. . .

8. All pending court proceedings between the parties to be discontinued without costs.

9. The Tripartite Agreement to be filed in U. S. District Court as part of record of settlement.

. . .

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* Asher W. Schwartz, Engineers' counsel.

** A. DiPasquale, Company's assistant vice president—labor relations.

Agreement of December 11, 1964

American Airlines, Inc. (American) and the American Airlines Chapter, Flight Engineers International Association (FEIA) and the pilots in the employ of American Airlines as represented by the Allied Pilots Association (Pilots) hereby agree:

1. The following prior agreements are hereby affirmed:

(a) The Memorandum of Tentative Agreement between American and the FEIA as initialed by Asher W. Schwartz and A. Di Pasquale on October 17, 1964, which memorandum includes as its Exhibit B a Tripartite Agreement.

. . .

2. [Same as "Appendix C annexed to Agreement" (Supp. Jt. App. 13-15)]

3. [Same as "Appendix D annexed to Agreement" (Supp. Jt. App. 16)]

. . .

6. This agreement becomes effective immediately, but if it fails to be ratified as set forth above, the agreement will thereupon terminate and be without any further force and effect.

Agreement of December 11, 1964

Signed at New York, New York, this 11th day of December, 1964.

/s/ Joseph V. Manning
For the AAL Chapter,
Flight Engineers
International Association

/s/ J. R. Lyons
For the Allied
Pilots Association
/s/ Ralph L. Harkenrider

/s/ J. O. Jarrard
For American Airlines, Inc.

Witnesses: [Omitted]

Letter from Pilots' Counsel to Chief Deputy Clerk

December 15, 1964

Hon. Edmund P. Cullinan
Chief Deputy Clerk
United States Supreme Court
Washington 25, D. C.

Dear Mr. Cullinan:

Mr. Wisehart's letter of December 14, 1964, accurately reflects the status of *O'Connell* v. *Manning*, No. 454, as well as No. 455, *American Airlines* v. *Manning*.

The Board of Directors of the pilot group will be meeting shortly to ratify an agreement among the various parties. Since, as Mr. Wisehart points out, one of the provisions of this agreement requires the termination of all litigation among the parties, I have been instructed to make every effort to limit any unnecessary Court costs. Therefore, while it is possible that the litigation may be continued, I would nonetheless respectfully request that you and the Court defer any further action in printing or preparing the record. I understand that it would be an imposition to make this request for more than a limited period of time, and we will inform you immediately of all further developments in this matter.

Sincerely,

MARTIN C. SEHAM

cc: ARTZ, Esq.
SHART, Esq.

Letter from Company's Counsel to Chief Deputy Clerk

January 6, 1965

Hon. Edmund P. Cullinan
Chief Deputy Clerk
United States Supreme Court
Washington 25, D. C.

Re: American Airlines, Inc. v. Manning, No. 455

Dear Mr. Cullinan:

Confirming our conversation today, this is to advise that the settlement between the parties in the above entitled matter has been ratified by the employees concerned. Therefore, subject to completion of some necessary paper work, it is anticipated that a stipulation for dismissal pursuant to Rule 60 will be submitted within about six weeks. This no doubt will also apply to No. 454, although we are not parties in that case.

Sincerely,

ARTHUR M. WISEHART
Attorney for American Airlines, Inc.

cc: ALEXANDER W. SCHWARTZ, ESQ.
MARTIN C. SEHAM, ESQ.

Stipulation for Dismissal Proposed by Company's Counsel

This stipulation, entered into by and between counsel for the parties this day of December, 1964.

WITNESSETH:

WHEREAS, the parties have entered into a Tripartite Agreement dated as of December 11, 1964, with the assistance of the National Mediation Board, and

WHEREAS, the Tripartite Agreement constitutes a permanent settlement of the Crew Complement Dispute on American Airlines, Inc., and

WHEREAS, it is anticipated that this settlement will inaugurate a new and harmonious era in the relationships of the parties, and

WHEREAS, the continuation of adversary proceedings is both unneeded and undesirable in these circumstances,

NOW, THEREFORE, it is stipulated and agreed that:

1. Pending litigation will be disposed of as set forth below;

(a) In the Flight Engineer Bargaining Case, all outstanding orders will be vacated and all appeals and pending requests for relief will be dismissed, with prejudice and without costs to any party. (The Flight Engineer Bargaining Case is *Ruby* v. *American Airlines, Inc.*, 63 Civ. 585, 227 F. Supp. 674 (S. D. N. Y. 1963), 329 F. 2d 11 (2 Cir. 1964),

certiorari granted, — U. S. —, 33 U. S. L. W. 3179, Nos. 454, 455 (1964).)

(b) In the Dues Check-Off Case, all outstanding orders will be vacated and the case dismissed with prejudice and without costs to any party. (The Dues Check-Off Case is *Manning* v. *American Airlines, Inc.*, 63 Civ. 1187, 221 F. Supp. 301 (S. D. N. Y. 1963), 329 F. 2d 32 (2 Cir. 1964), certiorari denied, — U. S. —, 85 S. Ct. 33, No. 79 (1964).)

2. The foregoing cases did not result in final judgment, and have been superseded by collective bargaining. Accordingly, no aspect thereof, or any determinations therein, shall be regarded as evidence that the parties, or any of them, have violated any requirements of law.

3. The Petition for Leave to Intervene in Case No. C-3351, before the National Mediation Board, will be withdrawn by American Airlines, Inc.

IN WITNESS WHEREOF, counsel for all parties have set forth their signatures below as of the date first above written.

.....

Counsel for American Airlines, Inc.

.....

Counsel for AAL Chapter, Flight Engineers International Association

.....

Counsel for Allied Pilots Association

Revision Suggested by Engineers' Counsel of Paragraph 2 of Company Counsel's Proposed Stipulation

2. The parties have resolved the issues between them through collective bargaining, and they, or any of them, will not initiate any independent action or proceeding in any Court or before any administrative body based upon any of the determinations in the foregoing cases.

Revision Suggested by Pilots' Counsel of Paragraph 2 of Company Counsel's Proposed Stipulation

2. The issues between the parties have been finally resolved through collective bargaining and the termination of the litigation hereinbefore described and they agree that none of them will initiate or participate in any action or proceeding before any Court, Agency, Board, or other forum whether governmentally or contractually established upon the basis of any of the determinations in the foregoing cases or upon the basis of the events and transactions from which such cases arose.

Alternative Stipulation for Dismissal Proposed by Engineers' Counsel*

IT IS HEREBY STIPULATED that the above-entitled action may be dismissed with prejudice, each party to bear his own costs.

Dated: New York, New York
March ; 1965

Attorney for American Airlines, Inc.

Attorney for AAL Chapter, Flight Engineers' International Association

Attorney for Allied Pilots Association

* See Moore's Manual. *Federal Practice Forms*. No. 19:3. p. 19-5 (1964).

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